REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **FAO (OS) NO. 623/2006 and CM No.13791/2006**

% **Date of Decision** : 08th February, 2007.

SUNITA SHIVDASANI .... Appellant.
Through Mr. Aseem Mehrotra, Advocate.

VERSUS

GEETA GIDWANI & ANR. .... Respondents.
Through Mr. Arun Kumar, Advocate for R-1.
Mr. Puneet Verma, Advocate for R-2.

**CORAM:**

**HON'BLE DR. JUSTICE MUKUNDAKAM SHARMA, CHIEF JUSTICE**
**HON'BLE MR.JUSTICE SANJIV KHANNA**

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported in the Digest ? YES

**SANJIV KHANNA, J:**

1. Mr. K.D. Shivdasani, expired on 10th May, 1991. His wife had predeceased him. Parties to the present appeal are daughters of Late Mr. K.D. Shivdasani. Respondent No. 1, Ms.

Geeta Gidwani, has filed a suit for partition and perpetual injunction against the appellant-Ms. Sunita Shivdasani and respondent No. 2-Ms. Pooja Gangaramani in respect of movable and immovable properties left behind by late Mr. K.D. Shivdasani.

2. The appellant in her written statement has propounded an oral Will in her favour by late Mr. K.D. Shivadasani and has claimed that Mr. Gopal Deumal Shivdasani, elder brother of Mr. K.D. Shivadasani, has informed her about the said oral Will.

3. By the impugned order dated 22nd May, 2006, learned single Judge has held that under the Indian Succession Act, 1925 (hereinafter referred to as the Act for short), there can be Privileged and Unprivileged Wills. Unprivileged Wills must be in writing and should also comply with the requirements of Section 63 of the Act. Privileged Wills can be made by a soldier employed in an expedition or engaged in actual warfare or mariner being at sea. Privileged Will are oral but requirements of Section 66 of the Act must be complied with including presence of two witnesses at the time when the oral Will is made and a Will made by word of mouth is null at the expiry of one month, if the testator is alive. Ld. Single Judge has held that

late Mr. K.D. Shivadasani could not have made a privileged will.

4. Learned counsel for the appellant had submitted that oral Wills by ordinary persons have been recognised and accepted and in support of his contention had relied upon the following decisions:-

(i) Mt. Izhar Fatma Bibi and others versus Mt. Ansar Fatma Bibi and others, AIR 1939 Allahabad 348.

(ii) Mahabir Prasad and Another versus Syed Mustafa Husain and Others, AIR 1937 Privy Council 174.

(iii) Venkat Rao and another versus Namdeo and others, AIR 1931 Privy Council 285

(iv) Ganesh Prasad versus Lala Hazari Lal and others, AIR (29) 1942 Allahabad 201

(v) Ramchandra versus Anasuyabai AIR 1969 Mysore 64 and

(vi) Shanti Lal versus Mohal Lal, AIR 1986 J & K 61.

5. Learned counsel for the respondent, on the other hand, had referred to Sections 63, 65 and 66 of the Act.

6. It is correct that the Act was enacted to consolidate law applicable to intestate and testamentary succession. The Act consolidated and repealed nine different Acts including Hindu

Wills Act, 1870 but this by itself is not the determining factor.

7. Under the customary law, a Hindu could make a Will in writing and also orally i.e. a nuncupative Will. However, with the enactments of the Hindu Wills Act, 1870, Hindus were required to make Wills or codicils in writing and the same were also required to be signed and attested. However, the said Act was applicable only on Wills or codicils made or executed on or after 1st September, 1870 within specified territories and to Wills and codicils outside those territories in so far as they related to immovable properties situated within the specified territories.

8. With the repeal of Hindu Wills Act, 1870 by passing of the Act in question, the existing mandatory provisions that a Hindu must make a written Will were re-enacted in clauses (a) and (b) of Section 57 of the Act. Sub-Clause (c) to Section 57 was added by Act 18 of 1929. The effect of sub-Clause (c) is that it makes provisions of Part VI, as set out in Schedule III of the Act, applicable to all Wills made by Hindus, Buddhists, Sikhs and Jainas on or after 1st January, 1927. Section 57 of the Act, for the sake of convenience is reproduced below:-

> "**Application of certain provisions of part to a class of wills made by Hindus etc**.- The provisions of this part which are set out in Sch III shall, subject to the restrictions and modifications specified therein, apply-"
>
> (a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September 1870 within the territories which at the said date were allowed .... to the Lieutenant Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of judicature at Madras and Bombay; and
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> (b) to all such wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits; and
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> (c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of January 1927, to which those provisions are not applied, by cll (a) and (b).
>
> Provided that marriage shall not revoke any such will or codicil."

9. With the enactment of Clause (c) all Wills and Codicils made by any Hindu on or after 1st January, 1927 must comply with sections of Part VI specified in Schedule III of the Act. Part VI of the Act comprises of Sections 57 to 191.

However, only Sections specified in Schedule III of the Act have been made applicable to Wills made by a Hindu. Sections which are not specified in Schedule III are not applicable to Wills made by a Hindu.

10. Schedule III of the Act is as under:-

> "PROVISIONS OF PART VI APPLICABLE TO CERTAIN WILLS AND CODICILS DESCRIBED IN SECTION 57
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> Sections 59, 61,62, 63, 64, 68, 70, 71, 73, 74, 75, 76, 77, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 95, 86, 89, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157-189 and 190.
>
> Restrictions and modifications in application of foregoing sections
>
> 1. Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated inter vivos, or to deprive any persons of any right of maintenance of which, but for the application of these sections, he could not deprive them by will.
>
> 2. Nothing therein contained shall authorise any Hindu, Buddhist, Sikh or Jaina, to create in property any interest which he could not have

created before the first day of September 1870.

3. Nothing therein contained shall affect any law of adoption or intestate succession.

4. In applying s 70 the words 'then by marriage or' shall be omitted.

5. In applying any of the following sections namely 75, 76, 105, 109, 111, 112, 113, 114, 115 and 116 to such will and codicils the words 'son', 'sons', 'child', and 'children' shall be deemed to include an adopted child: and the word 'grand-children' shall be deemed to include children, whether adopted or natural-born of a child whether adopted or natural-born; and the expression 'daughter-in-law' shall be deemed to include the wife of an adopted son."

11. Section 57 read with Schedule III makes Sections 63 of the Act applicable to all Hindus. Section 63 of the Act relates to execution of unprivileged Wills and reads as under:-

"**Execution of unprivileged wills**.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall executed his will according to the following rules:

> (a) The testator shall sign or shall affix his marks to the will, or it shall be signed by some other person in his presence and by his direction.
>
> (B) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.
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> (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and such of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

12. In view of Section 57 read with Schedule III of the Act, requirements of Section 63 must be complied with and are mandatory for a Will executed by a Hindu. A Will which does not comply with the requirement of Section 63 of the Act is null and void. Clause (a) to Section 63 requires a Will should be in writing because it is to be signed or marked by the testator himself or signed by some other person in the presence of the Testator or on his direction.

A Will, as per Section 63, is also required to be attested by two or more witnesses. Thus section 63 of the Act requires a Will to be in writing.

13. Section 65 of the Act relates to execution of privileged Wills or oral Wills. Section 65 has not been included in Schedule III and in view of Sections 57 of the Act, the same is therefore not applicable to Hindus. It, therefore, follows that Hindus cannot make a privileged Will after 1st January, 1927 even if conditions of Section 65 are satisfied. Section 66 of the Act will obviously have no application to Hindus as the said Section relates to mode of execution of an oral or a privileged Will and other conditions for a valid oral will.

14. Judgment of the Allahabad High Court in the case of Mt. Ishar Fatima Bibi (supra) is a case of a mohammedan and therefore has no application. Similarly, in the case of Mahabir Prasad (supra), Privy Council was considering the alleged oral Will made by a mohammedan. Mohammedans are still competent to make oral Wills. Section 57 is not applicable to mohammedans. Judgment of the Privy Council in the case of Venkat Rao (supra) relates to oral disposition by one Mr. Vishram Patil who expired on 23rd December, 1919 and was a resident of Central Provinces. The said decision obviously has no

application as provisions of Section 57 of the Act were not applicable and the provisions of Section 2 of the Hindu Wills Act, 1870 were also not applicable as the deceased was not living in the specified area. Hindus too could make oral Wills prior to Hindu Wills Act, 1870 and thereafter in those territories where the Act was not applicable subject to the condition that a Will in writing was required in case of immovable properties located within the specified area. Full Bench of Allahabad High Court in Ganesh Prasad case(supra) examined the question whether on death of a Hindu his self acquired property would devolve on his undivided sons to the exclusion of the divided son under the Mitakshara Law. The oral Will relied upon was of 1926 (see page 218 in the All India Reporter). In Ramachandra's case (supra) oral Will by one Krishnaji was propounded on the basis of a document executed by his widow in 1904. These cases relied upon by the appellant do not relate to oral Wills made by Hindus after 1st January,1927. It is quite clear that there is no scope for a Hindu to make an oral or a nuncupative Will after the said date. Judgment of Jammu and Kashmir High Court in the case of Shanti Lal (supra) did not specifically examine this issue and question including Section 57 of the Act. The provisions of the Act have not been considered and dealt with. The question whether a Hindu can execute an oral Will after enactment and enforcement of the Act, was not in question in the said decision. A decision is a binding precedence for what it

states and not for what can be inferred and presumed to have been decided. (Refer Punjab National Bank Versus R.L. Vaid reported in 2002 (4) SCC 638), and A-One Granites versus State of UP reported in 2001 (3) SCC 537.)

15. The Appeal and the application are accordingly dismissed. The appellant will also pay cost of Rs.5,000/- to the Delhi High Court Bar Association Library Fund. Costs will be deposited within four weeks from today.

**(SANJIV KHANNA)**
**JUDGE**

**(DR. MUKUNDAKAM SHARMA)**
**CHIEF JUSTICE**

**FEBRUARY 08, 2007.**
**VKR/P**